WC 07-28

Before the
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

In the Matter of:
Expedited Consideration for a Declaratory Ruling)
To determine the Jurisdictional & Revenue Scope)
for Florida Department of Revenues and the IRS tax)
base under AT&T's CSTPII/RVPP Offering to then)
further calculate the Florida & IRS tax rewards for)
Tips Marketing Services, Corp.)
)
)
Tips Marketing Services, Corp.)
Petitioner)
)
and)
AT&T Corp.)
Respondent)

REQUEST FOR DECLARATORY RULINGS

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Federal Communications Commission
Office of the Secretary
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January 3rd, 2007

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Summary

1) Combined Companies Inc. (CCI) was a Florida domiciled corporation that was AT&T's primary customer, which subscribed to AT&T's CSTPII/RVPP under tariff No. 2. Under section 3.3.1.Q bullet 10 of the CSTPII/RVPP discount plans general provisions, CCI was AT&T's customer and was financially responsible for all shortfall and termination charges of CCI's end-user locations, which were located in all 50 States.

2) CCI's CSTPII/RVPP plans utilized AT&T's Enhanced Billing Option (EBO). This option dictated that CCI would inform AT&T how much of CCI's total 28% discount AT&T should provide each end-user location, when that end-user enrolled under CCI's CSTPII/RVPP discount plan. Under EBO the difference between the discount level applied to the end-user and the CSTPII/RVPP's total 28% discount was paid in the form of a monthly check by AT&T to CCI.

3) In June of 1996 AT&T alleged that the CSTPII/RVPP plans were in shortfall. Shortfall is the difference between what the CCI's revenue commitment was and the actual amount of revenue used at the time of shortfall fiscal year true-up calculation. There is currently before the FCC other Declaratory Rulings that are addressing whether these pre June 17th 1994 CSTPII/RVPP plans should have been exposed to shortfall charges in the first place; however for the purposes of this Declaratory Ruling it will go on the assumption that the shortfall charges were valid.

4) In June of 1996 AT&T applied the alleged shortfall charges to CCI's end-user accounts which were located in all 50 States. When AT&T applied the shortfall charges to the end-users bills AT&T did not charge any sales taxes on the shortfall charges. Application for a Tax Reward was made by Tips Marketing Services, Corp., (Tips) using Form DR-55 with the Florida Department of Revenue due to Florida law which states it is owed its 7% sales tax on shortfall; additionally Florida would receive taxes on possible barter between CCI and AT&T.

Tips also filed for a reward with the Internal Revenue Service (IRS) due to AT&T not applying Federal Excise Taxes (FET) and also the possible barter between CCI and AT&T.

5) What is the proper jurisdiction and revenue scope under the CSTPII/RVPP plans of AT&T's under Tariff No. 2 that is the question that the FCC is to issue a Declaratory Ruling on so the taxing authorities can determine the taxable base to which to apply the applicable tax rates.

6) AT&T in June of 1996 inflicted shortfall and termination charges against CCI's end-users. These charges were removed from CCI's end-users bills in July 1996, obviously one month after the shortfall and termination charges were initially applied. The charges were transferred from all the end-users bills to CCI's sole master account. The charges remained on CCI's master account without the Florida sales taxes/IRS (FET) ever having been applied by AT&T to the charges.

7) AT&T and CCI then enter into a non disclosure settlement agreement in July of 1997 and the shortfall and termination charges were used by AT&T to negotiate a settlement between AT&T and CCI. The sales taxes/FET never were applied or paid by AT&T. AT&T utilized the alleged shortfall charges in return for: A) CCI's cooperation in defending AT&T against 4 companies that were owned by Mr. Inga which were former co-plaintiffs' of CCI, and which continue to have its claims against AT&T. B) Compensation to CCI for damages that were ruled by District Court (Judge Hayden) as different damages than those suffered by the 4 Inga Companies.

8) The FCC is not being asked to decide whether the taxes should be applied to the shortfall and termination charges; that is a Florida/IRS issue. The amount of the tax reward paid by Florida/IRS to petitioner can be calculated by Florida/IRS after the FCC decides the jurisdictional scope of the revenue for the CSTPII/RVPP plans under AT&T tariff No. 2. The FCC will be asked to declare that the traffic transfer did not transfer away the shortfall and termination obligations away from the Florida based CCI. Additionally that the responsibility for the shortfall and termination obligations is that of the Florida based CCI; not CCI's end-users.

Summary End

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I Background: The Florida Company CCI Was Responsible for All Shortfall & Termination Charges of Its End-User Locations

1) Despite the fact that Combined Companies, Inc. (CCI) end-users were located in all 50 States, CCI was AT&T's primary customer of record under AT&T's CSTPII/RVPP tariff No. 2 offering. AT&T tariff section 3.3.1.Q at the 10th bullet states here as Exhibit A:

> Shortfall and/or termination liability are the **responsibility of the Customer.**[1]

2) Therefore CCI remained AT&T's customer even after it transfers to Public Service Enterprises (PSE) some of CCI's end-users. Under the tariff the shortfall and termination (S&T) obligations must stay with CCI since the CSTPII/RVPP AT&T discount plan stays with CCI, which plan ownership defines CCI as AT&T's continued Customer of Record.

3) The FCC's Oct 17th 2003 Declaratory Ruling agreed with AT&T's 1996 brief to the FCC determining that CCI's plans were not being terminated therefore AT&T confirmed CCI's continued responsibilities for shortfall and termination obligations. See FCC Declaratory Ruling Footnote 56 attached here on page 2 of **exhibit C.**

[1] The word "Customer" under AT&T's tariff is the toll free aggregator Combined Companies, Inc. (CCI); NOT the end-users. The end-users are the customers of CCI not AT&T.

> Although AT&T also argues that the move also avoided the payment of tariffed *termination* charges, *id.*, it separately states that termination liability (payment of charges that apply if a term plan is discontinued before the end of the term) **is not at issue here**. Opposition at 3 n.1. **That is consistent with the facts of this matter; petitioners never terminated their plans.** Accordingly, termination charges are not at issue in this matter.

4) Given the fact that AT&T itself agrees that CCI's plan was not being terminated the only possible conclusion as per AT&T's clear tariff language is that shortfall and termination obligations must stay with and are the responsibility of the Florida based customer (CCI).

5) Additionally, AT&T tariff section 2.1.8(E)'s provisions regarding remaining jointly and severally liable conclusively confirm that shortfall and termination obligations do not transfer on traffic transfers only on plan transfers. AT&T tariff section 2.1.8(e) addresses the duration that a **transferor** will remain jointly and several liable to AT&T for shortfall and termination obligations, which are transferred away from the **transferor** to the new AT&T **transferee** customer. The obvious reason why section 2.1.8(e) **only** addresses how long the transferor remains jointly and severally liable for the transferred S&T obligations on ---**plan transfers**----- is because: **It is ONLY on a plan transfer that the tariff mandates that shortfall and termination obligations must be transferred.**

6) The very simple reason why 2.1.8(E) does not address how long the transferor (CCI) must remain jointly and severally liable to AT&T for a **traffic only transfer,** is that on a traffic only transfer, the S&T obligations **DO NOT TRANSFER!** On traffic only transfers, the AT&T transferor customer (CCI), will always remain liable to AT&T for its S&T obligations, because the S&T obligations simply do not transfer on traffic only transfers. CCI could utilize other tariff provisions to manage its S&T obligations. Of course 2.1.8 E doesn't address joint and several liability on traffic transfers, because there is no joint and several liability, because the actual S&T obligations stay with the transferors plan. The bottom line is that due to the fact that CCI

only attempted a traffic only transfer in January 1995, the S&T obligations under the tariff, and thus by law, must stay with the Florida based CCI. (See 2.1.8(E) at **exhibit B)**

II AT&T Used an Illegal Remedy in Applying Charges to CCI's End-Users

7) AT&T used an illegal remedy by initially billing shortfall charges to CCI's end-users, when AT&T's alleged shortfall charges should have been charged to CCI. Typically AT&T would request payment from its customer the aggregator (CCI) and dun that receivable for a period of up to 90 days.

8) After dunning the receivable if CCI still did not pay AT&T's shortfall charges, AT&T's only tariffed remedy was to **reduce the discount amount** of the end-users, because AT&T had no right to charge shortfall charges to end-users which were not AT&T's customers. AT&T's tariff language at section 3.3.1.Q bullet 10 exhibit A is very clear:

> For billing purposes, such penalties **shall reduce any discounts** apportioned to the individual locations under the plan.

Here the tariff language is clear but even if it was not clear, by law, the language must be construed against the carrier (AT&T).

9) In essence because the end-users were not AT&T's customers what AT&T is limited to, is reducing the discounts of its aggregator Customer CCI; not inflicting shortfall on end-users.

III AT&T Concedes that the Billing Option Used by CCI In Which AT&T Bills the End-users, Does Not Determine that the End-users are AT&T Customers

10) AT&T has already made its position very clear to the FCC in a case involving this same exact transaction, stating that the end-users were not AT&T's.

AT&T's 2003 Further Reply Comments to FCC page 1:

> AT&T did not have any carrier relationship with Petitioners' customers (the "end-users"). Petitioners do not dispute the accuracy of these statements; just to the contrary, they repeatedly concede that they and not AT&T had the exclusive carrier-customer relationship with the end-users. Similarly the Petitioners acknowledge that "**although AT&T also rendered bills** to Winback & Conserves end-users on the behalf of the latter entity, **the billing arrangement** selected by the reseller **did not create any carrier–customer relationship between AT&T and the end-users.**

11) AT&T's 2003 Further Reply Comments to FCC Page 4:

> Petitioners also concede that the *liability* for all charges incurred by each location was **solely that of the petitioners not the end-users.**

12) AT&T's 2003 Further Reply Comments to FCC page 4:

> As AT&T's customers-of-record, **Petitioners were responsible for the tariffed shortfall and termination charges.** Section 3.3.1.Q of AT&T FCC No 2 See also AT&T Further Comments filed April 2nd 2003 ("AT&T's Further Comments 2003") at 7-8.

13) The FCC must again decide that the Florida based company (CCI) was AT&T's customer of record, not the end-users. AT&T had no right to bill end-users for shortfall charges since these end-users were not AT&T's customers. Also see FCC Oct 17th 2003 Decision fn. 52.

Here as Exhibit: **exhibit C**

> *See generally* AT&T Tariff FCC No. 2; AT&T Contract Tariff FCC No. 516. **As AT&T concedes, the end-users or "locations," were CCI's customers, not AT&T's.** *See* AT&T Further Comments at 6-10 (citing, *inter alia, AT&T Corp. v. Winback & Conserve Program, Inc.*, 16 FCC Rcd at 16075, para. 3; *First District Court Opinion* at 3); *see also MCI Telecommunications Corp v. AT&T*, File No. E-90-28, Order, 7 FCC Rcd 5096, 5100, para. 20 (CCB 1992). Because these end-users did not choose AT&T as their primary interexchange carrier, **AT&T had neither proprietary interest in these individual end-user locations nor an expectation of revenue from them.** *See Hi-Rim Communications, Incorporated v. MCI Telecommunications Corporation*, File No. E-96-14, Memorandum Opinion and Order, 13 FCC Rcd 6551, 6559 para. 13 (CCB 1998).

It is thus overwhelming clear that AT&T used an illegally remedy by applying shortfall to end-users, many of which were not located in Florida. These shortfall and termination charges if permissible should have only been applied to the Florida domiciled company CCI.

14) Due to having used an illegal remedy AT&T can not rely upon the shortfall and termination charges. The following is an FCC quote from its 2003 FCC Declaratory Ruling pg 14 para 21.

> We also conclude that AT&T did not avail itself of the remedy specified in its tariff for suspected fraud and thus can not rely upon the fraud sections of its tariff to justify its refusal to move the traffic.

15) The FCC also stated to the DC Circuit (FCC brief to DC Circuit pg. 25 para 2) its position on why AT&T could not rely upon the shortfall and termination due to the illegal remedy used by AT&T. [2]

> In essence, the Commission ruled that AT&T had invoked a remedy other than the ones authorized under its tariff. But the terms of the tariff define and constrain AT&T's conduct and specify the remedies available to the company in connection with its provision of tariffed services. *See AT&T v. Central Office Telephone Co., 524 U.S. at 222-24.* As this Court (DC Court) recently noted, "filed tariffs are pointless if the carrier can depart from them at will. Orloff, 352 F.3d at 421. Condoning AT&T's departure in this case from the remedial terms of its tariff would "undermine the regulatory scheme" and give AT&T the power to control the economic fates of its customers here, the resellers. The Commission's holding on this issue thus is both consistent with the law and reasonable.

16) AT&T concedes that these end-users are not AT&T's, and the tariff states that shortfall and termination charges are the responsibility of the Florida based company CCI's, for its non-terminated CSTPII/RVPP plan. The FCC needs to interpret the telecom aspects of AT&T tariff No. 2 which will then allow Florida to deal with any tax ramifications and allow Tips Marketing Services, Corp to obtain its tax reward.

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[2] Although the FCC law mandates that AT&T's shortfall and termination charges can not be relied up by AT&T due to the illegal remedy, Florida would still expect to receive its sales taxes on the shortfall charges if the shortfall charges were permissible. Therefore the shortfall and termination charges must be deemed null and void for telecom purposes but not as to tax ramifications.

IV Relief Sought

17) The FCC must declare that under AT&T tariff No. 2, shortfall and termination obligations must stay with the Florida customer (CCI's) CSTPII/RVPP when only traffic is transferred as opposed to transferring traffic with CCI's, CSTPII/RVPP discount plan.

18) The FCC must declare that AT&T violated its tariff No. 2, by using an illegal remedy in inflicting shortfall and termination charges to non Florida based CCI's end-users, well in excess of the aggregator afforded CSTPII/RVPP discounts.

19) The FCC must declare that AT&T, having used an illegal remedy, can not rely upon shortfall and termination charges due to the illegal remedy.

20) The FCC must declare that the responsibility for all the shortfall and termination obligations in 1996 is not the end-users responsibility but the responsibility of AT&T's primary customer---- the Florida based aggregator CCI.

Respectfully submitted,

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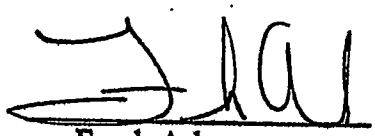
January 3rd, 2007

Tips Marketing Services, Corp.



Frank Arleo
Its' Attorney

Exhibit A

AT&T COMMUNICATIONS
Adm. Rates and Tariffs
Bridgewater, NJ 08807
Issued: March 10, 1994

TARIFF F.C.C. NO. 2
12th Revised Page 61.17
Cancels 11th Revised Page 61.17
Effective: March 11, 1994

3.3.1.Q. AT&T 800 Customer Specific Term Plan II (continued)

- If the Customer terminates the CSTP II within the first year of the plan and concurrently establishes a new CSTP II of greater value, no additional one time 1/2¢ credit will apply.
- All other specific term plans and service discounts are excluded from the CSTP II with the exception of the $.01 per minute access line discount. The AT&T 800 Service-Domestic $.01 per minute access line discount is applied after the Term Plan discount but before the RVPP discount.
- The Customer must commit to an annual commitment for three years as shown in Sections 3.3.1.Q.1. and 3.3.1.Q.8., or two years as shown in Section 3.3.1.Q.7., or one year as shown in Section 3.3.1.Q.9, following.

Bullet 4

- The Customer may add or delete an AT&T 800 Service or AT&T Custom 800 Service covered under the plan.
- In the event the Customer converts from another AT&T Term Plan to a CSTP II, there will be no decrease in the percent discount received by the Customer.
- The Customer will assume all financial responsibility for all designated accounts in the plan and will be liable for all charges incurred by each location under the plan.
- The Customer must also provide to AT&T, for each location participating in the above mentioned plan, written authorization for including the locations in the plan, billing account number and/or billed name, type of service, and address to which the bill is to be sent.
- In the event that a location is in default of payment, AT&T will seek payment from the Customer. If the Customer fails to make payment for the location in default, AT&T will: (1) reduce the discount by the amount of the billed charges not paid by that location, if any, and apportion the remaining discount, if any, to all locations not in default, and if payment is not fully collected by the above method, (2) terminate the RVPP/CSTP II for failure of the Customer to pay the defaulted payment.
- In the event of termination of the Customer's RVPP and/or Term Plan, the Customer being terminated must notify the individual locations that the RVPP and/or Term Plan has been discontinued and the individual locations not in default of their location billing charges will be converted to monthly rates as individual customers unless they notify AT&T otherwise.

Bullet 10

- Shortfall and/or termination liability are the responsibility of the Customer. Any penalty for shortfall and/or termination liability will be apportioned according to usage and billed to the individual locations designated by the Customer for inclusion under the plan. For billing purposes, such penalties shall reduce any discounts apportioned to the individual locations under the plan.

* This condition applies only to Customers whose CSTP II was in effect or on order prior to July 1, 1993. This does not apply to existing CSTP II Customers that renew their term plan after June 30, 1993.

Issued on not less than one day's notice under authority of Special Permission No. 93-672.

Exhibit B

** All material on this page is new. **

2.1.8.E. Transfer of Assignment (continued)

portion of any applicable minimum payment period(s), the unexpired portion of any term of service and usage and/or revenue commitment(s), and any applicable shortfall or termination liability(ies).

1. If the service being transferred or assigned is subject to an AT&T term plan, flex plan, or other discount plan with revenue or volume commitments offered under this Tariff, or a Contract Tariff under which WATS is provided (a Pricing Plan), then, to the extent specified in (a) through (c) following, the Current Customer is relieved of liability for charges that may be incurred after the Effective Date of the transfer, either as a result of a failure to meet revenue or volume commitments or monitoring conditions associated with such Pricing Plan (Shortfall Charges) or as a result of the discontinuance with liability of such Pricing Plan (Termination Charges). For purposes of these provisions, a charge is incurred on the date that the events giving rise to the charge become fixed (i.e., on the last day of a commitment period or the day on which a Pricing Plan is discontinued), not on the date the charge is billed.

(a) For a Shortfall Charge incurred for a commitment period that includes the Effective Date of the transfer, the Current Customer remains jointly and severally liable with the New Customer only for a percentage of the total Shortfall Charge equal to the number of days in the commitment period prior to such Effective Date divided by the total number of days in the commitment period.

(b) For a Termination Charge incurred less than 180 days after the Effective Date of the transfer, the Former Customer remains jointly and severally liable with the New Customer only for a percentage of the total Termination Charge equal to the difference between 180 and the number of days between such Effective Date and the date on which the Termination Charge is incurred, divided by 180.

(c) For a Shortfall Charge incurred for a commitment period after the commitment period that includes the Effective Date of the transfer, or for a Termination Charge incurred at least 180 days after the Effective Date of the transfer, the Former Customer is fully relieved of liability

F. Nothing herein or elsewhere in this tariff shall give any Customer, assignee, or transferee any interest or proprietary right in any 800 Service telephone number.

Joint and several liability only applies to plan transfers, not traffic transfers.

Exhibit C

end-user traffic from one aggregator to another, as CCI and PSE sought to effect in this case.[48] Section 2.1.8 concerned the wholesale transfer of "WATS" (which, according to AT&T itself, means "plans") from one customer to another. As such, its purpose was to maintain intact the balance of obligations and benefits between parties under the tariff when one customer stepped into the shoes of another. Thus, when, in December 1994, the Inga Companies transferred their CSTP II/RVPP plans to CCI, they were required to meet the conditions of section 2.1.8. Here, by contrast, CCI sought to move only the end-user traffic it had aggregated under its CSTP II out of that plan. PSE, in turn, sought to move that traffic into its CT 516. CCI did not seek to transfer the CSTP II/RVPP plans wholesale to PSE. Rather than a single transfer request, here CCI and PSE effectively made two requests: one by CCI to AT&T to decrease its traffic; and another by PSE to AT&T to increase its traffic. CCI and PSE retained the benefits and obligations of their respective agreements with AT&T. We note in this regard that both the forms submitted to AT&T and the agreement between CCI and PSE stated that CCI would continue to subscribe to its existing CSTP II plans.[49] Thus, CCI still would have to meet its tariffed commitments, without the use of the traffic moved to PSE, and AT&T also would remain obligated to CCI under the terms of Tariff No. 2.[50] The moved traffic would be used to meet PSE's CT 516 volume commitments and, once moved, would no longer be associated with CCI's CSTP II. If the traffic were moved away from CCI under Tariff 2, to PSE under Contract Tariff 516, AT&T would get less money for the same traffic – the traffic would be discounted 66 percent instead of 28 percent.[51] Implementing the carriers' request required AT&T only to move traffic – first, out of CCI's CSTP II, and second, into PSE's CT 516. As to whether the carriers' requests were permissible, we note that AT&T's tariffs with these carriers did not prohibit the addition or subtraction of traffic.[52] Accordingly, in response to the district court's question, "whether

[48] Ambiguities in a tariff are to be resolved against the carrier and favorably to customers. *The Associated Press Request for Declaratory Ruling*, File TS-11-74, Memorandum Opinion and Order, 72 FCC 2d 760, 764-65, para. 11 (1979) (citing *Commodity News Services, Inc. v. Western Union*, 29 FCC 1208, 1213, para. 3, *aff'd*, 29 FCC 1205 (1960)).

[49] *See* Exhibits G and H to Petition.

[50] CCI and PSE did agree that the traffic could be returned to CCI upon 30 days written notice from CCI that AT&T required CCI to meet its commitments. *See* Exhibit G to Petition. Accordingly, at least theoretically, the traffic might have been returned to CCI at some point to enable it to meet any CSTP II obligations. *Cf.* Reply at 10 (arguing CCI would receive more net income, and thus have more money available to pay any charges, after the traffic was moved to PSE). We do not speculate whether the traffic ever would have been moved back or whether it or some other development would have satisfied CCI's CSTP II commitments because AT&T did not move the traffic from CCI to PSE.

[51] *See First District Court Opinion* at 5. Exhibit G to the Petition, a letter agreement between CCI and PSE dated January 16, 1995, explains that, once the traffic was moved: (1) CCI's end-users (formerly the Inga Companies' end-users) would "be billed by AT&T at the prevailing AT&T Tariff 2 CSTP rates, less twenty three percent (23%) Customer Specific Term Plan (CSTP) discount, and 5.5% Revenue Volume Pricing Plan (RVPP) discount"; (2) CCI would get 80 percent "earned credit" for this traffic from PSE; (3) CCI would continue to be responsible to AT&T for any commitment associated with the CSTP II Plans (which would not be discontinued); and (4) PSE would assist in moving accounts back to CCI upon written notice from CCI that AT&T required CCI to meet its commitments. *See* Exhibit G to the Petition. Thus, the traffic would be discounted 66 percent instead of 28 percent and the end-users would receive a discount off AT&T's standard tariffed rates greater than the portion of the 28 percent they had received when their traffic was associated with the CSTP II plan. *See First District Court Opinion* at 3-5. The discount differential would be apportioned between CCI and PSE according to their letter agreement. *See also* n.66, *infra.*

[52] *See generally* AT&T Tariff FCC No. 2; AT&T Contract Tariff FCC No. 516. As AT&T concedes, the end-users or "locations," were CCI's customers, not AT&T's. *See* AT&T Further Comments at 6-10 (citing, *inter alia, AT&T Corp. v. Winback & Conserve Program, Inc.*, 16 FCC Rcd at 16075, para. 3; *First District Court Opinion* at 3); *see also MCI Telecommunications Corp v. AT&T*, File No. E-90-28, Order, 7 FCC Rcd 5096, 5100, para. 20 (CCB 1992). Because these end-users did not choose AT&T as their primary interexchange carrier, AT&T had neither proprietary interest in these individual end-user locations nor an expectation of revenue from them. *See Hi-Rim Communications, Incorporated v. MCI Telecommunications Corporation*, File No. E-96-14, Memorandum Opinion (continued....)

section 2.1.8 [of AT&T's Tariff] permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction,"[53] we conclude that section 2.1.8 of the tariff did not address or govern the movement of traffic without a plan and that AT&T's respective tariffs with CCI and PSE permitted it.

2. The "Fraudulent Use" Provisions

10. Petitioners' first request for declaratory relief goes beyond section 2.1.8 and asks the Commission to find that "[a]t the time of the attempted transfer ... in or about January, 1995, by CCI to PSE of the end user traffic under the CSTP II plans held by CCI, neither Section 2.1.8 of AT&T's Tariff F.C.C. No. 2, *nor any other provision of AT&T's Tariff F.C.C. No. 2*, prohibited CCI from transferring that traffic without also transferring the CSTP II plans with which that traffic was associated."[54] Here and before the district court, AT&T argues that the proposed "location-only transfer violated the 'fraudulent use' provisions of Section 2.2.4 of its tariff," thus justifying AT&T's refusal to accept the transfer from CCI to PSE.[55] It claims that the transfer from CCI to PSE "had both the purpose and the effect of avoiding the payment, in whole or in part, of tariffed shortfall ... charges"[56] because CCI's entire revenue stream would transfer to PSE, but PSE would have no corresponding obligation to pay any shortfall charges under the CSTP II.[57] Thus, AT&T argues "if only the traffic on the plans and not the plans themselves were transferred to PSE, *the liability for shortfall . . . charges attendant thereto would then be vested in CCI:* an empty shell."[58] Further, "[w]ithout the revenue generated by the traffic under the plans, CCI would have no income and no means of backing the responsibilities it maintained after the CCI/PSE transfer of traffic."[59] AT&T claims that, based upon statements made by Alfonse Inga, the owner of the Inga companies, it had reason to believe that CCI's proposed transfer was an attempt to avoid liability for shortfall charges under the Tariff.[60] Accordingly, AT&T argues, it had the right under section 2.2.4 to refuse to accept the transfer to PSE.[61]

11. Based upon our review of AT&T's tariff, we conclude that, even assuming that AT&T reasonably suspected a violation of the "fraudulent use" provisions of its tariff – which we do not decide – those provisions did not authorize AT&T to refuse to move the traffic from CCI to PSE. If AT&T had moved the traffic from CCI to PSE, then all of the traffic that CCI had used to meet its CSTP II/RVPP commitments would be associated with PSE's CT 516. Further, CCI (as well as the Inga companies[62]),

(...continued from previous page)
and Order, 13 FCC Rcd 6551, 6559 para. 13 (CCB 1998). Accordingly, AT&T could not refuse to move them out of CCI's CSTP II and into PSE CT 516. The fact that CCI sought to move all of its end-user locations, rather than just one or a few locations, did not confer a right on AT&T where none otherwise existed.

[53] *First District Court Opinion* at 15.

[54] Petition at 7-8 (emphasis added); *see also* n.44, *supra*.

[55] Opposition at 5 (footnote omitted); *see also First District Court Opinion* at 10.

[56] Opposition at 5. Although AT&T also argues that the move also avoided the payment of tariffed *termination* charges, *id.*, it separately states that termination liability (payment of charges that apply if a term plan is discontinued before the end of the term) is not at issue here. Opposition at 3 n.1. That is consistent with the facts of this matter; petitioners never terminated their plans. Accordingly, termination charges are not at issue in this matter.

[57] Opposition at 5, 12.

[58] *First District Court Opinion* at 10 (emphasis added); *see* Opposition at 12.

[59] *First District Court Opinion* at 10; *see* Opposition at 12.

[60] Opposition at 5, 11-12.

[61] Opposition at 5; AT&T Further Comments at 10-11.

[62] *See First District Court Opinion* at 9.